IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1039 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VARSANBHAI M RATHWA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1039 of 1994
MR GIRISH D BHATT with Mr. V.A. Vyas, for the appellant
Ms. B.R. Gajjar, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 09/10/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellant, VARSANBHAI M RATHWA, original accused, by filing this appeal under Section 374(2) of the Code of Criminal Procedure ('Code' for short), has challenged the judgment and order dated September 22, 1994, passed by the learned Additional Sessions Judge, Vadodara, Camp at Chhota Udepur, in Sessions Case No.15 of 1994, by which the appellant was convicted for the offences under Sections 302 and 498-A of the Indian Penal Code ('IPC' for short) and sentenced to undergo R.I. for life and fine of Rs.1000 in default R.I. for three months for the offence under Section 302 IPC and R.I. for one year and fine of Rs.500 in default R.I. for one month for the offence under Section 498-A IPC.

2. The appellant, who is a resident of village Vav, had married with one Shardaben (hereinafter referred to deceased) prior to eight years of the date of the incident, which took place on May 21, 1994. It was alleged that deceased Shardaben could not give birth to a child and, therefore, the appellant was ill-treating her. Due to the ill-treatment meted out to Shardaben, she had often gone to the house of her parents situated in the same village. Shardaben used to complain about the ill-treatment of the appellant before her parents, brother and sister. Prior to a week of the date of the incident, a quarrel had taken place between the appellant and Shardaben and she had gone to reside at her parents' house. P.W.1, Bhalsing Dhulabhai, had gone to the house of the appellant and had left Shardaben there. When P.W.1, Bhalsing Dhulabhai, had gone with Shardaben to the house of the appellant, the appellant did not welcome them and his behaviour towards Shardaben and P.W.1 Bhalsing Dhulabhai, was discourteous. After leaving Shardaben, P.W.1, Bhalsing Dhulabhai, had returned to his house situated at Moti Amrol.

3. On May 21, 1994, around noon hours, two persons from village Vav where the house of the appellant is situated, came to village Amrol and were enquiring about the house of P.W.1, Bhalsing Dhulabhai. The said two persons met P.W.4, Ravjibhai, on the way to village Amrol. The said two persons enquired whether P.W.4, Ravjibahi knew Bhalsing Dhulabhai. When P.W.4, Ravjibhai, replied that he knew Bhalsing Dhulabhai, the said two persons informed him that the sister of Bhalsing Dhulabhai, Shardaben, had become sick and her body had become cold. As per the say of P.W.1, Bhalsing

Dhulabhai, as soon as Ravjibhai informed about the sickness of his sister, Shardaben, P.W.1, Bhalsing Dhulabhai, in the company of Ravjibhai and other persons, had gone to village Vav where the house of the appellant is situated. P.W.1, Bhalsing Dhulabhai, and other persons accompanied him saw that Shardaben was lying in the house of the appellant and her body had become cold. The neck portion of the body of deceased Shardaben had become black. P.W.1, Bhalsing Dhulabhai, at once, returned to his house at village Moti Amrol and informed his father, P.W.3, Dhulabhai Shaktarbhai. P.W.1, Bhalsing Dhulabhai, accompanied by his father P.W.3, Dhulabhai, and other relatives, had gone to village Vav. As per the prosecution case, in the house of the appellant situated at village Vav, nobody was present and only the dead body of the deceased was lying on the otla. The dead body of the Shardaben had become very cold and the neck portion had become swollen. When P.W.1, Bhalsing Dhulabhai, learnt that his sister, Shardaben, was no more alive, he went to Pavi Jetpur Police Station to lodge complaint for the death of his sister, Shardaben. P.W.7, Police Head Constable, Vittalbhai Shhitabhai, had recorded the complaint lodged by P.W.1, Bhalsing Dhulabhai, and had entered the First Information Report in the register of Pavi Jetpur Police Station as C.R. No.151 of 1994 for the offences under Sections 302 and 498-A of the IPC. P.W.7, Vittalbhai, had informed about the incident to P.W.8, PSI, Jivabhai Hirabhai Parmar, who was at the relevant time serving as Police Sub- Inspector at Pavi Jetpur Police Station. The investigation of the above crime was handed over to PSI, Parmar, who had gone to the place of the incident around 1.30 noon on May 22, 1994. The inquest of the body of Shardaben was done by PSI, Parmar, and the dead body was sent to Pavi Jetpur Community Health Center for post-mortem. P.W.2, Dr. Dilipbhai Nathabhai Bhatpuria, had performed the post-mortem of deceased Shardaben on May 22, 1994 at 12 noon. In the post-mortem, it was revealed that the deceased had died due to strangulation because of pressing the neck and the hyoid bone was fractured. PSI, Parmar, had drawn the panchanama of scene of offence at village Vav and had recorded statements of witnesses. The appellant was arrested on May 22, 1994 for having committed the offences under Sections 302 and 498-A of the IPC. At the time of post-mortem examination, P.W.2, Dr. Bhatpuria, had collected sample of viscera which was sent to the Forensic Science Laboratory for analysis in order to find out whether any poison was administered on deceased Shardaben. PSI Patel, on completion of the investigation, and after receiving report from the FSL,

filed chargesheet against the appellant for the offences under Sections 302 and 498-A of the Indian Penal Code in the Court of the learned Judicial Magistrate, First Class, Chhota Udepur, which was registered as Criminal Case No.445 of 1994. As the offence under Section 302 IPC is exclusively triable by the Court of Sessions Judge, the learned Judicial Magistrate, First, Class, Chhota Udepur, by order dated June 30, 1994, committed the case to the Court of Sessions, Vadodara, where it came to be registered as Sessions Case No.15 of 1994. The said case came to be transferred to the Court of learned Additional Sessions Judge, Camp at Chhota Udepur,

4. Charge Exh.3 was framed against the appellant for the offences under Sections 302, 498-A and 201 of the Indian Penal Code. The appellant has pleaded not guilty and claimed to be tried. The prosecution in order to prove the charges framed against the appellant examined (1) P.W.1, Bhalsing Dhulabhai (brother of deceased Shardaben), Exh.6; (2) P.W.2, Dr. Dilipbhai Bhatpura Medical Officer, Pavi Jetpur Community Health Center, Exh.8; (3) P.W.3 Dhulabhai Shaktarbhai (father of deceased Shardaben) Exh.10; (4) P.W.4, Ravjibhai Keshavbhai Rathva, Exh.11; (5) P.W.5, Bhikhiben Mangabhai (mother of the appellant) Exh.12; (6) P.W.6, panch witness, Ramsingbhai Radtiyabhai Rathva, Exh.13; (7) P.W.7, Police Head Constable, Vittalbhai Shhitabhai Tadvi, of Pavi Jetpur Police Station Exh.18; and (8) P.W.8, PSI, Jivabhai Hirabhai Parmar, Exh.19. The prosecution produced documentary evidence such as First Information Report Exh.1, post-mortem notes Exh.9, inquest panchanama Exh.16, panchanama of place of incident Exh.14, report of the FSL Exh.21 and the certificate of probable cause of death issued by the Medical Officer, Community Health Center, Pavi Jetpur, Exh.24. After the evidence of the prosecution was over, the appellant was questioned and his statement came to be recorded under Section 313 of the Code. The defence of the appellant is that he was falsely involved in the case and he had not committed the murder of his wife, Shardaben.

5. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence, and the arguments advanced by the learned advocates for the parties, held that there was no direct evidence with regard to commission of murder of deceased Shardaben and the case of the prosecution entirely rests on circumstantial evidence. It was deduced that deceased Shardaben could not bear a child during eight years of wedlock and, therefore, the appellant was treating her

with physical and mental cruelty. It was further deduced that, as deceased Shardaben could not bear a child, the appellant wanted to marry again and, therefore, on May 21, 1994, around 11 a.m, he had committed the murder of his wife, Shardaben, by strangulating her at his residence at village Vav. It was further deduced that, with a view to destroy the evidence of causing death of his wife by strangulation, the appellant had tried to make out a case that the deceased Shardaben had committed suicide by taking poisonous substance. On the basis of the abovereferred to conclusions, the learned Additional Sessions Judge convicted the appellant for the offences under Sections 302 and 498-A of the Indian Penal Code and sentenced to undergo R.I. for life and fine of Rs.1000 in default R.I. for three months for the offences under Sections 302 IPC and R.I. for one year and fine of Rs.500 in default R.I. for one month for the offences under Sections 498-A IPC. However, the learned Additional Sessions Judge had acquitted the appellant for the offences under Section 201 of the Indian Penal Code. The appellant has filed the present appeal challenging the aforesaid conviction and sentence.

6. Learned advocate, Mr. G.D. Bhatt, assisted by learned advocate Mr. U.A. Vyas, for the appellant and learned APP, Ms. B.R. Gajjar, have taken us through the entire record and proceedings of the appeal.

7. Learned advocate for the appellant has vehemently submitted that the case of the prosecution entirely rests on the circumstantial evidence and, in the present case, the prosecution had not led cogent and convincing evidence to complete the chain which pointed out the guilt of the appellant beyond reasonable doubt. It is submitted that there are many inconsistencies, contradictions and improvements in the oral testimony of the witnesses examined by the prosecution, and the conclusions arrived at by the learned Additional Sessions Judge were based on assumption and presumption which are not permissible in a criminal trial. It is submitted by the learned advocate for the appellant that, when the case of the prosecution entirely rests on the circumstantial evidence, all the circumstances should be proved beyond doubt and the whole chain should be completed which can only establish the guilt of the appellant. It is submitted by the learned advocate for the appellant that, in the present case, the prosecution had not established its case against the appellant beyond reasonable doubt and, therefore, the benefit of reasonable doubt should be extended in favour of the appellant and the appeal be allowed and the judgment and

order of the conviction and sentence be quashed and set aside.

8. Learned APP, Ms. B.R. Gajjar, has, on the other hand, has submitted that the prosecution had proved beyond doubt that the appellant and the appellant alone had committed the murder of his wife, Shardaben, in his house at village Vav. It is submitted that, after the death of deceased Shardaben, the appellant had not informed her relatives at village Moti Amrol, nor had lodged a complaint at the Pavi Jetpur Police Station. It is submitted that the conduct of the appellant was highly doubtful and he had not taken care of his wife nor he had called any medical help before she had succumbed to death. The appellant had tried to create a show that the deceased had died due to consuming poisonous substance, which was also one of the circumstances against the appellant. Learned APP has also submitted that the fact that the post-mortem notes indicated that the deceased was done to death by strangulation and the dead body was found in the house of the appellant, was sufficient to hold the appellant guilty of having committed the murder of his wife and, therefore, the appeal be dismissed.

9. It is relevant to notice that the prosecution has not claimed that the incident in question was witnessed by any one and no direct evidence regarding the incident is tendered before the Court. Admittedly, the whole case against the appellant rests on circumstantial evidence. The law relating to circumstantial evidence is well settled. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis, but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these

facts by itself or themselves is, or, are, not decisive. Where a case rests squarely on circumstantial evidence, the various sets of circumstantial evidence should be taken into consideration and their total effect should be such that they must lead unerringly to the guilt of the accused. Each fact must be proved individually and only thereafter the sum total of the proved facts has to be taken into consideration, but this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must prove each and every hypothesis suggested by the accused, however, extravagant and fanciful it might be. In Sharad v. State of Maharashtra, AIR 1984 SC 1622, after referring to earlier case-laws, the Supreme Court has summarised the conditions to be fulfilled in a case based on circumstantial evidence as under :-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established; (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (iii) the circumstances should be of a conclusive nature and tendency; (iv) they should exclude every possible hypothesis except the one to be proved; (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; and (vi) where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. If the aforesaid various conditions are fulfilled, only then a Court can use a false explanation or a false defence as an additional link and not otherwise. As observed earlier, if the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts, called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way. It has to consider the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not and in dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that

every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, to human conduct and their relations to the facts of the particular case.

10. It is not in dispute that deceased Shardaben, who was a resident of village Moti Amrol, was married to the appellant who is a resident of village Vav, prior to eight years of the incident. It is also admitted fact that Shardaben could not give birth to a child during the long years of the wedlock. Because of this reason, the appellant was ill-treating the deceased and, for that reason, the deceased used to often go to her parents' house. As per the case of the prosecution, prior to one week of the incident, because of the cruelty meted out to deceased Shardaben, she had gone to reside at her father's place at village Moti Amrol. P.W.1, Bhalsing Dhulabhai, pursuaded deceased Shardaben and had taken her to her matrimonial house and left her there. It is the prosecution case that deceased Shardaben was found dead at the place of the appellant around 11 a.m. on May 21, 1994. It is the prosecution case that the appellant had strangulated deceased Shardaben by pressing her neck. The evidence of P.W.5, Bhikhiben Mangabhai, who is the mother of the appellant, indicates that deceased Shardaben had left her matrimonial home by informing her that she was going to her parents' house. The evidence of P.W.8, PSI, Parmar, also indicates that, during the course of investigation, it was revealed that on the day of the incident, i.e. on May 21, 1994, in the morning, deceased Shardaben had visited Jetpur and when she had gone to Jetpur, the appellant had not accompanied her. The prosecution has not explained or has not led any evidence with regard to visit of deceased Shardaben to Jetpur. When the prosecution witness deposed that the deceased had left for matrimonial house in the morning of the day of the incident, her presence at the house of the appellant becomes doubtful.

11. It also requires to be stated that the circumstances on which the prosecution had relied upon pointing out the guilt of the appellant were not put to the appellant during his recording of further statement under Section 313 of the Code. If any circumstance, which connects the appellant with the crime in question, was proved, then it was incumbent upon the Court to put that question to the appellant asking him to explain the incriminating circumstance which was to be used against

him. Even otherwise, the circumstances which have been said to have been proved pointing out the guilt of the appellant were not duly established in the eye of law. If the deceased had left her matrimonial home on the day of the incident, it was incumbent upon the prosecution to prove that she had returned to her matrimonial home before 11 a.m. when it is alleged that the appellant had committed her murder by strangulating her. In our view, if the evidence of the prosecution is scanned minutely, the whole chain of the circumstances was not completed and not established in the eye of law. When the whole chain of circumstances was not completed, in our view, the appellant cannot be held liable for having committed murder of his wife, Shardaben. In view of the above circumstances, we are of the opinion that the benefit of reasonable doubt should be extended in favour of the appellant and he should be acquitted of the charge framed against him.

12. As a result of foregoing reasons, the appeal is allowed. The conviction of the appellant for the offences under Sections 302 and 498-A of the Indian Penal Code and the sentence imposed on him to undergo R.I. for life and fine of Rs.1000 in default R.I. for three months for the offences under Sections 302 IPC, and R.I. for one year and fine of Rs.500 in default R.I. for one month for the offences under Sections 498-A IPC, by the learned Additional Sessions Judge, Vadodara, Camp at Chhota Udepur, vide judgment and order dated September 22, 1994, in Sessions Case No.15 of 1994, are quashed and set aside. The appellant, VARSANBHAI M RATHWA, is ordered to be set at liberty forthwith if his presence is not required in connection with any other criminal case. The muddamal be destroyed in terms of the directions contained in the impugned judgment.

October 9, 2002 (M.H. Kadri, J.)

(H.H. Mehta, J.)
(swamy)